Supreme Court of the United States.

Nos. 190 and 191.—October Term, 1906.

No. 190. Thomas R. Martin, Plaintiff in Error,
vs.
The District of Columbia.

No. 191. Clarence A. Brandenburg, Plaintiff in Error;
vs.
The District of Columbia.

In Error to the Court of Appeals of the District of Columbia.

[March 11, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

These are writs of certiorari to test the validity of assessments for the widening of an alley in Washington under the Act of Congress of July 22, 1892, c. 230, (27 Stat. 255,) as amended by the Act of August 24, 1894, c. 328, (28 Stat. 501.) The writs were quashed by the Supreme Court of the District and the judgments affirmed by the Court of Appeals. 26 App. D. C. 140; 146. The principal case is that of Brandenburg, the owner of land taken for the widening. That of Martin raises questions as to the rights of a mortgagee of the same land. The main issue is upon the constitutionality of the Act. The statute authorizes the Commissioners of the District to condemn, open, widen, &c., alleys upon the presentation to them of a plat of the same accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, &c., or in certain other cases. After prescribed preliminaries the Commissioners are to apply to the marshal of the District to empanel a jury of twelve disinterested citizens, and the marshal is to empanel them, first giving ten days' notice to each proprietor of land in the square. The jury is to appraise the damages to real estate and also is to "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid," including fixed pay for the marshal and jury, "according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending or straightening such alley," with certain deductions. The amendment authorizes the Commismissioners to open minor streets, to run through a square, &c., whenever in the judgment of said Commissioners the public interests require it.

The law is not a legislative adjudication concerning a particular place and a particular plan like the one before the Court in *Wight* v. *Davidson*, 181

U. S. 371. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the Act would not be disposed of by the decision in *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the Fourteenth Amendment, a system of delusive exactness and merely logical form.

But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 344, to reconcile the decision in that case with *Norwood* v. *Baker*, 172 U. S. 269.

And yet it is evident that the Act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in *Wight* v. *Davidson*, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation, (181 U. S. 378, 379,) of *Bauman* v. *Ross*, 167 U. S. 548, when the same principle was sustained in a general law. 167 U. S. 589, 590. It is true again that in *Bauman* v. *Ross* the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that on the practical distinction to which we have adverted in connection with *Louisville & Nash-*

ville R. R. Co. v. *Barber Asphalt Paving Co.*, the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

In view of the decisions to which we have referred it would be unfortunate if the present Act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it "according as each lot or part of lot of land in such square may be benefited by the opening, &c." Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears.

It is clear however from the petitions and the returns that the jury did not administer the statute in the way in which we have determined that it should be read. About one-fifth of each lot was taken, and was valued at $92 and $75 respectively. That would give a value of $368 and $300, at the most, to the remaining portions, before the improvement was made. These lots were assessed $650 less said $92, or $558, and $550 less said $75, or $475. It is most improbable that the widening of an alley could have nearly trebled the value of each lot. We think it apparent, as was assumed by the Court of Appeals, that the jury understood their duty to be to divide the whole cost among the land owners, whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. There is nothing in the record sufficient to show that the jury took a different view, or that they limited the assessment to the benefit actually conferred on these lots. For this reason the assessment must be quashed, and it will not be necessary to consider the special objections of the mortgagee.

Judgments reversed.

Mr. Justice HARLAN, Mr. Justice WHITE and Mr. Justice MCKENNA concur in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.